**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**CIVIL APPELLATE JURISDICTION**
**FIRST APPEAL NO.3042 OF 2006**

Regional Director,
E.S.I.Corporation ...Appellant

vs.

M/s.J.S.Garments ...Respondent

Mr.H.V.Mehta for the Appellant
Mr.C.R.Naidu for the Respondent.

**CORAM: A.S.OKA,J.**
**DATE OF HEARING LAST ARGUMENT: 24TH JANUARY 2007**
**DATE OF PRONOUNCEMENT OF JUDGMENT: FEBRUARY 15,2007.**

**JUDGMENT:**

1. This Appeal is preferred under section 82 of the Employees' State Insurance Act,1948 (hereinafter referred to as the said Act of 1948). The Appeal takes exception to the Judgment and Order dated 26th November 1996 passed by the learned Judge of the Employees' State Insurance Court, Mumbai in an Application under section 75 of the said Act of 1948 filed by the Respondent herein.

2. Following substantial question of law arises in this Appeal :

. "Whether the period of limitation of five years provided under the proviso to Clause (b) of the section 77(1-A) of the said Act,1948 is applicable to a demand/claim made by the E.S.I.Corporation on the basis of an order under section 45-A of the said Act of 1948 ?"

3. The cause of action for filing the Application under section 75 of the said Act of 1948 arose as an order was passed by the first Appellant under section 45-A of the said Act of 1948 holding that the establishment of the Respondent is covered by the provisions of the said Act of 1948 from 1st August 1979. The said order was passed on 16th December 1991. By the impugned order, the order passed under section 45-A of the said Act of 1948 is held to be illegal and recovery certificate dated 9th April 1992 issued on the basis of the said order has been set aside.

4. The learned Trial Judge held that the period of limitation of five years provided under section 77 (1-A) applies to the claim/adjudication made under section 45-A of the said Act of 1948. The learned Trial Judge has therefore held that the claim made by the Appellants under Order dated 16th December 1991 was barred by limitation.

5. I have heard the submissions of the learned Counsel for the parties. The learned Counsel for the Appellant submitted that now the issue regarding applicability of limitation has been decided by the Apex Court, in the case of E.S.I.C. Vs. C.C. Santhakumar in Civil Appeal No.4291 of 2000 and other connected Appeals. He submitted that the Apex Court has held the provision of limitation under section 77(1)(A) will not apply. The learned Counsel for the Respondent submitted that

even if the specific period of limitation will not apply, the action under section 45-A of the said Act of 1948 will have to be taken within a reasonable time.

6. I have considered the submissions. The Apex Court in the aforesaid decision was considering the question, "Does the proviso to clause (b) of section 77 (1-A) fix the limit of time, in which the Corporation can make a claim from the employer, on the basis of an order passed under section 45-A of the said Act of 1948 ?". The Apex Court held that the limitation of three years for filing an Application can only relate to an application under section 75 read with section 77(1-A) of the said Act of 1948. The Apex Court held that order under section 45-A need not be executed by the Corporation before the E.S.I. Court under section 77 of the said Act of 1948. In paragraph 10 of its decision, the Apex court has held thus:

"10...So, the limitation of three years for filing an application before the Court, introduced by Act 44 of 1966, can only relate to the application under section 75 read with 77 (1A). The order under section 45-A need not be executed by the Corporation before the E.S.I. Court under Section 77. **As such, the amendment to Section 77(1A) (b) proviso by Act 29 of 1989 providing five year limitation has no relevance so far as orders by the Corporation under Section 45-A**

> **are concerned. Where an order is passed under section 45-A, it is the duty of the employer and not the Corporation to approach the E.S.I. Court. Since no application need be filed by the Corporation after an order is passed under section 45-A, the limitation prescribed under section 77 does not get attracted.** The non-payment of contribution is a continuing cause, which is clear from the fact that the employer is enjoined to pay the interest under section 39(5)(A), which was introduced by Act 29 of 1989, until the date of its actual payment."
>
> (Emphasis supplied)

7. The Apex Court, however, proceeded to hold that the demand must be raised by the E.S.I. Corporation within a reasonable time. The Apex Court held that what is reasonable time in a given case has to be considered after considering the factual aspects of a particular case. Therefore, it follows that a demand which is not made in reasonable time is illegal.

8. Turning back to the facts of the present case, the order impugned has been passed on the footing that the limitation as provided in proviso of clause (b) of section 77(1-A) is applicable to a demand made by the Corporation. Obviously, the said view is totally contrary to what is held by the Apex Court in the aforesaid case. However, the Trial Court has not considered the question whether the demand has been made by

the Corporation within a reasonable time. For deciding the said question, factual aspects of the case will have to be considered. Therefore, impugned order deserves to be quashed and set aside and the Application under section 75 of the said Act of 1948 will have to be considered afresh in the light of what is observed in this Judgment.

9. Hence, I pass the following order :

i) Impugned Judgment and Order dated 26th November 1996 is quashed and set aside and the Application (ESI) No. 87 of 1992 is restored to file.

ii) Parties are directed to appear before the trial court on 26th March 2007.

iii) It is made clear that the demand made by the Appellants cannot be held to be barred by limitation. However, while agitating the other aspects on merits as regards the demand, it will be open for the Respondent to urge that the demand is not made within a reasonable time. If such contention is raised, the Trial Court will decide the same. The parties are free to lead further evidence.

iv) The Trial Court will pass a final order as expeditiously as possible and preferably on or before 30th September 2007.

v) All issues on merit except the issue of applicability of period of limitation framed in this Appeal are kept open.

**JUDGE**